Supreme Court of the United States

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tory in order that the facts in this case may have a fuller setting. First, however, we state the issues:—

THE ISSUES.

Following is Plaintiff in Error's concluding prayer to this Court:

> "The question is submitted with confidence that the Court will protect the people in the enjoyment of those constitutional checks and safeguards against their own power which with wisdom and deliberation they created for themselves. Injustice and misrule have characterized all unconstitutional democracies and all popular governments administered in accordance with the whims and caprices of the multitude."
>
> Plaintiff in Error's Brief, p. 154.

This is the broad issue.

The special issues are raised by the assignment of errors, and are as follows:

1. *Is the Initiative system of the State of Oregon a violation of the provision in the Federal Constitution, that "The United States shall guarantee to every State in this Union a Republican Form of Government"?*

Article IV, section 5.

We claim:—

First—That the Congress of these United States, a department that is co-ordinate with this Judicial Department, has repeatedly passed upon the question at issue and, therefore, under the settled practice in this Court it will not trench upon the powers conferred by the Constitution upon Congress.

Marbury vs. Madison, 1 Cranch (U. S.), 137 (1803);

Luther vs. Borden, 1 How. (U. S.) 1 (1849);
Texas vs. White, 7 Wallace (U. S.), 700, 731 (1868);
Taylor and Marshall vs. Beckham, 178 U. S. 548 (1900).

Congress at its last session voted to admit Arizona as a State, and its constitution includes the Initiative system.

In 1907 the Executive Department of the Government, acting under instructions by Congress, passed upon the constitutionality of the Initiative system and expressly held that it is a republican form of government and in harmony with the Declaration of Independence.

The two houses of Congress, each of which possesses the exclusive right to "be the judges of elections, returns, and qualifications of its own members," has for twelve years been admitting members from a State or States in which the constitution includes the Initiative system. Thus, for twelve years the Congress of the United States has been passing upon the question at issue.

Second—But should this Court take jurisdiction we submit that inasmuch as the Oregon Supreme Court has passed upon the constitutionality of the Initiative system in the State government, that this Court will apply the rule of the Federal Courts, and adopt the decision of the State Court on questions concerning the constitution and laws of the State.

Luther vs. Borden, 7 Howard (U. S.), 1;
Taylor and Marshall vs. Beckham, 178 U. S. 548, 578;
Leeper vs. State of Texas, 139 U. S. 462-467.

truth concerning public questions. Three sets of publicity pamphlets are issued by the Secretary of State and mailed to each registered voter at his home. One pamphlet presents the platforms of the candidates within the several parties preparatory to the selection of party leaders. Another is issued after the nominations have been made, and sets forth the platforms of the several nominees. A third platform is issued before the other two, and presents the arguments for the questions of public policy that are to be directly voted upon at the polls.

Furthermore, after months of discussion the questions are directly submitted, without partisan bias because the Initiative and Referendum questions are separated from the partisan ones; the voters go to the polls and a ballot is handed out setting forth the precise issues, *and the decision is by the intelligent and earnest voters. The ignorant and careless voters are eliminated by their failure to mark the referendum questions.* Thus there is an educational qualification, self-operating.

The proportion who fail to mark the referendum ballot averages from 10 to 25 per cent. This is under the Optional Referendum and the Initiative where none but questions of considerable importance are submitted.

It is different under the Compulsory Referendum, which is the system in most States whereby constitutional amendments are submitted. Comparatively unimportant amendments are submitted by the Legislature, *and no way is provided whereby arguments on both sides, or either side, are placed in the voters' hands.*

This vital defect is generally recognized by statesmen. In New York State it led to a recommendation by the then Governor Hughes, now a member of this Court, that a system be devised whereby proposed amendments and arguments should be placed before the voters. Oregon has in-

stalled the needed publicity system. As yet, however, the Legislature in Oregon does not fully represent the people, as we shall presently demonstrate.

Plaintiff in Error objects to the Initiative system, a system whereby the voters can propose to themselves constitutional amendments and statute law, *whenever the Legislature fails to properly represent them,* and Plaintiff in Error asks this Court to declare that this protective power in the voters shall be declared unconstitutional.

We answer by calling this Court's attention to the fact that an Initiative Petition is principally used to take the place of a Constitutional Convention in proposing to the voters the needed changes in the system of government. *Under both systems the people by direct vote enact into law such provisions as meet their approval.* Under both systems Direct Legislation prevails, and during the 135 years of our independent life as a Republic no one has claimed that the people of the several States should not be permitted to directly legislate on whatever subjects they might choose to incorporate into the State Constitutions. To such an extent has this been developed that our State Constitutions resemble codes of laws.

Should this judicial department of the Federal Government interpose and declare that direct legislation by the people when proposed by Initiative Petition is unconstitutional, the restoration of real representative government will be delayed in these United States. We say "restoration of real Representative Government in these United States" because the people lost, in a large measure, their system of representative government by the debasement of the party convention system during the years leading up to 1844. In the words of Senator Benton, written in 1853, in his "Thirty Years in the United States Senate":

People of United States Lost Self-Government During 1830 to 1844.

> "That [Democratic National] convention [of 1844] is an era in our political history to be looked back upon *as the starting point in a course of usurpation which has taken the choice of President out of the hands of the people, and vested it in the hands of a self-constituted and irresponsible assemblage* * * * It was the first instance of such a disposal of the presidency—for these nominations are the election, so far as the party is concerned; but not the last. *It has become the rule since, and has been improved upon.* These assemblages now perpetuate themselves, through a committee of their own, ramified into each State, sitting permanently from four years to four years; and working incessantly to govern the election that is to come, after having governed the one that is past. The man they choose must always be a character of no force, that they may rule him; and they rule always for their own advantage—'constituting a power behind the throne greater than the throne.' * * * *Until this convention system is abolished, and the people resume their rights, the elective principle of our government is suppressed; and the people have no more control over the selection of the man who is to be their President, than the subjects of kings have over the birth of the child who is to be their ruler.*" (Thirty years in the United States Senate, vol. II, pp. 595-596, by Senator Thomas H. Benton. Italics ours.)

The usual name for this system of government is Machine Rule. More in detail, it is Machine Rule Party Government, as distinguished from People's Rule Party Government.

Ruling System of Government (Party Government) Is Outside the Written Constitution.

Party Government is the system of government in this country, as we all know, *and it is nowhere mentioned in*

the Federal or State Constitutions. It is an extra-legal system.

It is in several parts:—

First. There is an immense number of Party Committees. In each of the two great parties of today there are something like 100,000 precinct committees and 25,000 county committees; 392 congressional district committees; 48 state committees, and one national committee. This is the organization within each of the two great parties.

Second. There used to be a large number of Party Legislatures (Party Conventions), all of which were outside of the constitutional legislatures, and these Party Legislatures decided party policies and elected officers within the party and nominated the candidates for public office. Each four years each party has a National Party Legislature or Convention; and each one or two years each party has 48 Party Legislatures or Conventions except as direct primaries and platform conferences have been established in two-thirds of the States. The status in the several States is set forth in Senate Document 603, 61st Congress, 2nd session, page 9.

Every two years 392 Congressional District Party Legislatures or Conventions are held in each party, except as direct nominations have been established in two-thirds of the States.

Every one or two years each party holds 25,000 County Party Legislatures or Conventions, except as direct nominations have been established in two-thirds of the States.

Each year 100,000 Precinct Caucuses or direct elections within the parties (direct primaries) are held by each party for the election of party committeemen and delegates to conventions and the nomination of candidates for public office.

Third. A large amount of Campaign Funds are supplied and used, first, in the contest within each party for the control of the party, and, second, in the contest between the parties. Campaign funds are a necessity, and, therefore, *the citizens who supply these funds are the controlling political power.*

Fourth. The party that comes out successful in the contest between the parties controls each Constitutional Legislature, and does so by means of the Party Caucus—an organization nowhere mentioned in the written constitution.

Fifth. The party leader who heads the ticket in a State or in the Nation, and is successful, becomes the Governor of the State or the President of the United States, each holding public office, *and each being pledged to carry out the legislation indicated by the Party Legislature or Convention, and pledged also to promote in other ways the interests of the party;* whereas each party leader when in public office is usually inclined to state that he is the representative of the whole people.

Such is the system of government in the United States—Party Government. It operates through the Constitutional Government.

Party System Invaluable if People Are to Rule.

A Party System, of some kind, is a necessity if the people of a nation are to be self-governing or tend toward self-government. They must co-operate politically.

Party Government Is People's Rule or Machine Rule.

Where the Party System is such that the people secure legislation in their own behalf it is People's Rule Party

Government; and where legislation is against the people's interest, being for the ruling few, the system is Machine Rule Party Government. Both are Representative Government, one being genuine and the other counterfeit.

Machine Rule System in United States, 1830 to 1844 and Subsequent Years.

The system of real Federal Government in 1844, described by Senator Benton, was counterfeit representative government—*Machine Rule Party Government.* The people did not control in the Democratic National Convention of 1844, as Benton has clearly stated. In the words of John C. Calhoun, some time previous to the holding of that convention:

> "I object, then to the proposed convention, because it will not be constituted in conformity with the fundamental articles of the republican creed. The delegates to it will be appointed from some of the States, not by the people in districts, but, as has been stated, by State conventions *en masse*, composed of delegates appointed in all cases, as far as I am informed, by county or district conventions, and in some cases, if not misinformed, these again composed of delegates appointed by still smaller divisions, or a few interested individuals. Instead then of being directly, or fresh from the people, the delegates to the convention will be the delegates of delegates, and of course removed, in all cases, at least three, if not four degrees from the people. At each successive remove, the voice of the people will become less full and distinct until, at last, it will be so faint and imperfect as not to be audible. To drop metaphor, *I hold it impossible to form a scheme more perfectly calculated to annihilate the control of the people over the Presidential election, and rest it in those who make politics a trade and live or expect to live on the government.*"
>
> Calhoun's Address to the members of the Democratic party; published in "Thirty Years in the U. S. Senate," Vol. II, p. 596.

Later, in 1853, Senator Benton said:

"Mr. Calhoun considered the convention system, degenerated to the point it was in 1844, to have been a hundred times more objectionable than the Congress caucuses which had been repudiated by the people: *measured by the same scale, and they are a thousand times worse at present*—having succeeded to every objection that was made against the Congress caucuses, and superadded a multitude of others going directly to scandalous corruption, open intrigue, direct bargain and sale, and flagrant disregard of the public will * * *

"One other objection to these degenerate conventions Mr. Calhoun did not mention, but it became, since he made his address, a prominent one and an abuse in itself, which insures success to the train-band mercenaries whose profligate practices he so well describes. This is the two-thirds rule, as it is called; the rule that requires a vote of two-thirds of the convention to make a nomination. This puts it in the power of the minority to govern the majority, and enables a few veteran intriguers to manage as they please. And when it is remembered that many are allowed—even the delegates of whole States—to vote in the convention, which can give no vote to the party at the election, *it might actually happen that the whole nomination might be contrived and made by straw-delegates, whose constituency could not give a single electoral vote.*"

"Thirty Years in the United States Senate."
Vol. II, pp. 597-599.

Machine Rule System in 1888.

Thirty-three years after Benton wrote the above, another description of party government in this country was penned by the Hon. James Bryce, member of the British Parliament. In "The American Commonwealth," published in 1888, Mr. Bryce says:

"During the last fifteen or twenty years, the war issues being practically settled, public-spirited citizens

have addressed themselves to the task, which ought to have been undertaken in 1850, of purifying politics. Their efforts began with city government, where the evils were greatest, but have now become scarcely less assiduous in State and National politics.

"Will these efforts continue, and be crowned by a growing measure of success?

"To a stranger revisiting America at intervals, the progress seems to be steadily though very slowly upward."

American Commonwealth, Vol. II, p. 848, 3rd edition.

The political conditions at the time Mr. Bryce wrote are set forth in his chapters on "The Party System." He describes the party organization, usually spoken of as the "machine"; tells "what the machine is to do"; states "how the machine works," and in conclusion says:

"Observing the form of consulting the voters, the the machine substantially ignores them, and forces on them persons whom they do not know, and would dislike if they knew them. It substitutes for the party voters generally a small number of professionals and their creatures, extracts prearranged nominations from packed meetings, and calls this consulting the pleasure of the sovereign people. * * *

"Thus the Machine works on, and grinds out places, power and opportunity for ILLICIT GAIN to those who manage it."

American Commonwealth, Vol. II, p. 106, 3rd edition. (Capitals ours.)

That this was a correct statement of conditions in 1888 is known to everyone who was familiar with party government in this country at that time. The people were not self-governing; they were ruled by a party organization termed the "machine," and the controlling power in this machine was the secret use of money, very largely.

That the people of the United States were the ruling power previous to the debasement of the party convention system is undisputed. Following is a statement in DeTocqueville's "Democracy in America," written just previous to 1833:

> "The Democratic principle has gained so much strength by time, by events, and by legislation, as to have become not only predominant, but all-powerful. * * *
>
> "The Anglo-Americans are the first nation who have been happy enough to escape the dominion of absolute power. They have been allowed by their circumstances, their origin, their intelligence, and especially by their morals, *to establish and maintain the sovereignty of the people.*"
>
> Vol. I, pp. 67-68; Gilman Edition.

The result of the people's rule—the rule of the multitude or majority rule—is stated by DeTocqueville as follows:

RESULT OF PEOPLE'S RULE, 1776 TO 1836 AND 1844.

> "America exhibits in her social state an extraordinary phenomenon. Men are there seen on a greater equality in point of fortune and intellect, or, in other words, *more equal in their strength, than in any other country of the world or in any age of which history has preserved the remembrance.*".
>
> Vol. I, p. 67.

DeTocqueville further says in the introduction to the twelfth edition, written in 1848:

> "Now this problem, which among us [in France] has just been proposed for solution, was solved by America more than sixty years ago. The principle of the sovereignty of the people, which we enthroned in France but yesterday has there held undivided sway

for over sixty years. It is there reduced to practice *in the most direct, the most unlimited, and the most absolute manner.* For sixty years, the people who have made it the common source of all their laws have increased continually in population, in territory, and in opulence; and—consider it well—it is found to have been, during that period, not only the most prosperous, *but the most stable, of all the nations of the earth.* Whilst all the nations of Europe have been devastated by war or torn by civil discord, the American people alone in the civilized world have remained at peace. Almost all Europe was convulsed by revolutions; America has not had even a revolt. The republic there has not been the assailant, *but the guardian, of all vested rights;* the property of individuals has had better guarantees there than in any other country of the world; anarchy has there been as unknown as despotism."

Stated from a different angle, the result of the People's Rule for the sixty years after 1776 was a tendency to Equal Rights—the termination of Special Privileges—namely:

The establishment of equal rights between families—the putting an end to entailed estates;

The establishment of equal rights within families—the ending of primogeniture, whereby the eldest son took practically all of the family estate;

The establishment of equal rights to an education—the founding of the free public school system; and

The establishment of equal rights between churches, and freedom of religious worship—the separation of Church and State.

These improvements led to equal political rights among white men—the right to vote—the termination of property qualifications. This took place in the East and South during 1800 to 1826. White manhood suffrage existed from the beginning in the West.

Now, compare the results after the people lost self-government:—

RESULTS UNDER MACHINE RULE, 1836 TO 1844 AND 1877.

The ruling few, who operated through machine politics, under the guise of the people's rule, passed laws granting special privileges to themselves, as we have already indicated. These privileges were in the form of charters for railways, charters for State banks to issue paper money, and other forms of privilege. Railroads that had been started under State ownership in Michigan, Pennsylvania, Illinois, and Virginia were all sold out to private corporations (Vol. VI, American Economic Association Series, p. 487). Furthermore, the ruling few who now owned the private monopolies in railway transportation authorized themselves to buy up the competing canals (Vol. V, American Economic Association Series, p. 288). Later the ruling few granted to their railway corporations public lands and public funds, at the same time refusing to limit by law the charges that should be exacted from the people for railroad transportation; they also refused to prohibit discrimination in railway rates.

And the rulers, in the name of the people, issued an immense amount of state and municipal bonds. During the twelve years succeeding 1830, at about which time the rule of the people ended and the rule of the few began, the growth of the public debt in the United States was from $13,000,000 to $200,000,000, *an increase of* 1600 *per cent. All this in twelve years.* (The date is by Prof. Edmund James in American Economic Association Series.)

During 1839 a severe industrial depression occurred, caused by a collapse of the general price level; this, in turn, being due *to the collapse of bank credits and paper money. The State machines began to repudiate the State debts.* The

creditor class and the people in general in order to protect themselves against further issuances of State bonds and paper money and, in other ways, to restrict the excesses of the ruling few, wrested from them in several of the States *calls for constitutional conventions;* and, in each of these conventions the few who gained admission framed provisions and submitted them to the people, *by whom they were enacted into law by direct vote.* Thus, in a limited way, the direct-vote system was temporarily re-established.

Partial Re-Establishment of Voters' Sovereignty at Time of Voting on Constitutional Amendments.

The voters in Pennsylvania were the first thus to attack the rule of the few. A constitutional convention was secured in 1838. Four years later the voters of Rhode Island were successful; as were those of New Jersey in another two years, 1844, and of New York in 1846, with the voters of Illinois triumphed at the end of another two years. Victories in other States followed in rapid succession, Virginia, Michigan and Kentucky in 1850, and Ohio, Indiana and Maryland the next year.

The Granger Uprising, 1870-75.

Not until after the war of 1860-65 did the business men and farmers rise *en masse* against the railway monopolies. This was termed the Granger Uprising, because the newly formed Granges were organizations through which the sentiment of the oppressed could find voice. A constitutional convention was secured in Illinois in 1870, and three years later in Pennsylvania. In Illinois the next Legislature enacted a drastic railway law.

The result is described as follows by President Hadley, of Yale University, in his book on Railroad Transportation:

> "This law was pronounced unconstitutional by Judge Lawrence. The result was that he immediately after

ward failed of re-election on this ground. The defeat of Judge Lawrence showed the true significance of the farmers' movement. They were concerned in securing what they felt to be their rights, and they were unwilling that any constitutional barriers should be made to defeat the popular will. They had reached the point where they regarded many of the forms of law as mere technicalities. THEY WERE DANGEROUSLY NEAR THE POINT WHERE REVOLUTIONS BEGIN.

"But they did not pass the point. The law of 1873 avoided the issue raised by Judge Lawrence against that of 1871. Instead of directly fixing maximum rates, it provided that rates must be reasonable, and then further provided for a commission to fix reasonable rates. Similar laws were passed by Iowa and Minnesota almost immediately afterward. The legislature of Wisconsin went even further, fixing, by the so-called Potter Law the rates on different classes of goods at figures which were quite unremunerative. The railroads made vain attempts to contest these regulations in the courts. They were defeated again and again, and, finally, in 1877, the Supreme Court of the United States sustained the constitutionality of the Granger Laws."

Hadley on "Railroad Transportation," 133-135.

(Capitals are ours.)

Without going farther into the results that have flowed from the rule of the few, we turn to the movement for the restoration of the people's rule.

PEOPLE'S RULE MOVEMENT, 1888 to 1911.

The lifting of the veil from the machine-rule system by Hon. James Bryce, combined with other favorable conditions, resulted in a wide-spread reform sentiment, one that has developed mightily alongside the growth of the machine-rule system itself and the growing concentration of wealth and political power. At the same time, the people

have succeeded in establishing one governmental reform after another:

First. The so-called secret ballot was established. This was largely during the years from 1884 to 1894, but the recent exposure of corruption in Adams County, Ohio, shows that the so-called secret ballot is largely a hoax, at least in certain counties.

Second. Registration of voters was established. This movement took place about the time of the campaign for the secret ballot. Registration of voters was fought and resisted by the ruling few, one of the claims being that it was unconstitutional.

Third. In place of the control of party caucuses by party bosses and their henchmen, the people secured laws from the Legislatures establishing control by public officials and other forms of protection for the voters at the polls. This legal control of party caucuses was bitterly fought by the ruling few.

Fourth. Gradually the people in two-thirds of the States have secured direct nominations for public office in place of nominations for public office by machine rule party conventions, except that the control of the National party organizations, the most important of all, is still retained in far-off delegate conventions. Only in a few States has provision been made for direct choice of Presidential nominees and direct election of delegates to National party conventions.

Fifth. Publicity for campaign contributions and expenditure began to be established in 1890. The movement has gradually developed until at the last session of Congress a law was enacted providing for publicity both before and

after the primaries, and before and after the elections, with limitations upon the amount of money which candidates may lawfully expend.

Sixth. Corrupt practices acts have been largely expanded. In Oregon, in 1908, through the use of the Initiative system a large amount of admirable restrictions have been placed upon party managers and party candidates. Until the establishment of the Initiative system, the people had to secure their reforms from Legislatures controlled by the machine itself which wrote the laws and it frequently inserted loopholes, including unconstitutional provisions to kill the law.

Seventh. In Oregon the people have supplied themselves with publicity pamphlets, as we have said, page 6, above. *This prevents deception and is the cheapest possible way of publishing and distributing the necessary information.*

Eighth. An additional way in which campaign funds are supplied by the people themselves, through their government is set forth in a Colorado law of 1909, appropriating State funds for the necessary campaign expenses and apportioning it among the party committees.

Ninth. The Initiative and the Optional Referendum in combination with Party Government have been established in State after State. In this way the people in seventeen States have taken to themselves or are to vote upon a proposal to take to themselves an option to ballot direct upon public questions whenever they choose to do so, *thereby getting from under the rule of party machines.* The States are Maine, Wisconsin, California, Oregon, Washington, Montana, North Dakota, South Dakota, Nebraska, Colorado, Wyoming, Utah, Nevada, Missouri, Oklahoma, Arkansas and Arizona.

Thus the people in more than one-third of the States of the Union are opening up a way whereby they can gradually *and carefully* reform the machine-rule party government. In other words, the Initiative Petition is being used to take the place of the Constitutional Convention. For example, in Oregon during 1904 under the Initiative system eight per cent. of the voters proposed to their fellow citizens the establishment of direct primaries for the nomination of men to public office in place of nominations by delegate party conventions; and another eight per cent. group proposed to their fellows that they establish in themselves, in each community, a right to decide whether or not intoxicating liquors should be placed on sale. *The people's verdict in both cases was to take to themselves the proposed increase of power.* Thus machine rule on these two important subjects was abolished, or at least largely curbed.

Six years have elapsed since the first use of the Initiative Petition in Oregon to propose to the public important changes in the system of party government and although a considerable number of changes have been effected, *the party organization in the Legislature is not yet wholly in accord with the people's will.* The people have demonstrated that this is so by rejecting the Legislature's proposal that a constitutional convention be called in which the few delegates would possess a monopoly of the right to propose amendments. In other words, machine-rule party government still exists in the Oregon Legislature. In the words of the Hon. W. S. U'Ren, of Oregon City, one of the leaders in the People's Rule movement:

> "The members of the legislature [of 1910-1911] were a very fair lot of men individually and above the average of intelligence, but the session was one of the worst Oregon has had for log-rolling, hasty action and partisan voting, with small consideration for the merits of bills. *The legislature was not at all representative of the people.* All but 23,000 of the voters of Oregon are

progressive, but the gerrymandered districts and plurality system of electing results in giving the tories an actual majority in the legislature. Governor West vetoed nearly seventy of the bills passed and should have vetoed more."

Direct Legislation Record, July, 1911, p. 113.

This demonstrates that in Oregon the machine-rule system is still dominant in the Legislature; but the people possess the Initiative system and are going forward to amend the machine-rule party system until it becomes again real representative government. The next steps proposed by the Oregon People's Power League are: (1) the election of members of the Legislature by proportional representation—that is, the election of ten or more members from a large district in place of one member from a small district wherein a small percentage of voters hold the balance of power and might be swayed by the use of money; and (2) the establishment of majority nominations and majority elections in place of plurality nominations and plurality elections. Majority elections prevailed until the establishment of machine-rule party government, some seventy years ago (Prof. John R. Commons, in Proportional Representation, p. 344—edition of 1907). In early days majority elections were secured by a second election, as is the case today in Continental Europe. An improved system, and the one proposed in the United States, is preferential voting, which is the designation of first choice, second choice, and third choice, thereby securing a majority vote at a single election.

Eleventh. Until the year 1908, the Initiative and Referendum movement was carried on outside of the parties by the organized wage-earners, by many of the organized farmers, and by People's Rule and other leagues. In 1908 the people secured control of the Democratic National Convention and declared for the restoration of their sovereignty. The wording of the platform is as follows:

"The conscience of the nation is now aroused and will free the Government from the grip of those who have made it a business asset of the favor-seeking corporations. It must become again a people's government, and be administered in all departments according to the Jeffersonian maxim, 'Equal rights to all, special priviliges to none.'

"'Shall the people rule?' is the overwhelming issue which manifests itself in all the questions now under discussion."

In the ensuing campaigns the Democratic organization was defeated, but two years later it scored a sweeping success, as also did the people's-rule advocates within the Republican party. Since that time the insurgency within the Republican organization has greatly increased and at a conference of representatives from thirty States in the City of Chicago, early in October this year, the following resolution was adopted unanimously:

"The Progressive movement is a struggle to wrest the control of Government in the Nation and States from the representatives of Special Privilege and restore it to the control of the people."

Such is the broad political situation in this country.

We now present a statement of some of the facts in the case before this Court.

II.

THE SPECIAL ISSUES.

Important Facts in the Case.

The Plaintiff in Error in this case is a public-service corporation that has been taxed by the people of Oregon through

the Initiative system. The reason why the people used the Initiative system is stated as follows in the proceedings of the American Political Association, 1907, p. 213, by Mr. George Thacher, of Portland, Oregon:

> "It is also interesting to note that the report of the Tax Commission shows beyond any doubt that the public service corporations of Oregon have succeeded for years *in escaping paying from one-half to two-thirds of their share of taxes,* principally by the means of exceedingly low valuations of real and personal property, and no mention at all of franchises." (Italics ours.)

Mr. Thacher further explains the situation as follows:

> "The legislature of 1903 created a new system of taxation for the State which was duly adopted. Six months later it was discovered that through inadvertence the law was so framed that it would not go into effect until a year later than it was generally supposed to do. The old tax law having been repealed, the State faced the prospect of no revenue for a year. In that crisis the governor called the legislature in special session to remedy the defect. The legislature, adopting the wisdom ascribed to the man in the nursery rhyme, 'who jumped into a bramble bush and scratched out both his eyes,' promptly repealed the law it had enacted with such pains, and as promptly enacted the law it had previously repealed. The tax law then having its eyes scratched in again, the legislature adjourned. The jump in and the jump out did leave one permanent effect, for whereas formerly a few hundred dollars' worth of property was exempted from taxation in the case of each individual, *now there is no such exemption. It will doubtless be a long day before that supposed injury is forgotten by poor men.* The legislature of 1905 created a tax commission to report at the 1907 session a plan for remodeling the tax laws, *but the people were impatient and laid some taxes themselves at the polls in* 1906."
>
> Proceedings of the American Political Science Association, 1907, p. 212.

This bears out the general principle we have stated in the foregoing pages, that in Oregon the party organization in control in the Legislature does not represent the people. It represents the special interests—the holders of special privileges. Today one of these special interests, a public-service corporation, is the Plaintiff in Error in this Court, and it is asking your Honors to declare void the Initiative system in Oregon, and thereby help to prevent the restoration of the people's rule and of real representative government, which is the special issue in this case.

The Argument by Plaintiff in Error.

But the Plaintiff in Error conceals this real issue and conceals the fact that Congress has expressly passed upon the question at issue. The principal claim of Plaintiff in Error is that the Initiative system is not a Republican form of government, and therefore should be declared void by the United States Supreme Court under Article IV, section 4 of the Federal Constitution, which declares:

> "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

But Plaintiff in Error does not mention in his Brief the following important facts:—

Points Not Mentioned by Plaintiff in Error.

1. Congress has voted to admit Arizona as a State, and its Constitution includes the Initiative system.

Here is a decision by the Political Department of the Government, and should the Judicial Department claim

jurisdiction for the same question it would lead to a contest beteween the two co-ordinate departments of the government; whereas it is the settled practice in this Court from its very inception not to trench upon the other co-ordinate departments of government. This was expressly stated in Marbury vs. Madison, 1 Cranch, 137, in 1803. In 1849, in Luther vs. Borden, 7 Howard, p. 1, this Court held that the enforcement of the guarantee of a Republican form of government is for the political department—Congress. In the words of this Court in Taylor and Marshall vs. Beckham, 178 U. S. 548:

> "It was long ago settled that the enforcement of this guarantee [of a Republican form of government] belonged to the political department. Luther vs. Borden, 7 How. 1. In that case it was held that the question, which of the two opposing governments of Rhode Island, namely, the charter government or the government established by a voluntary convention, was the legitimate one, *was a question for the determination of the political department;* and when that department had decided, the courts were bound to take notice of the decision and follow it; and also that as the Supreme Court of Rhode Island holding constitutional authority not in dispute, had decided the point, the well-settled rule applied that *the courts of the United States adopt and follow the decisions of the State courts on questions which concern merely the Constitution and laws of the State.*" (Italics ours.)

Such is the settled law in this Court, and the Plaintiff in Error nowhere discusses it. The only mention of Luther vs. Borden is to what Daniel Webster, counsel in the case, is reported to have said on a different point (pp. 5, 23 and 24 of Brief by Plaintiff in Error.)

2. In 1907 the Executive Department of the Federal Government, acting under instructions by Congress, passed upon the constitutionality of the Initiative

SYSTEM, AND HELD THAT IT IS A REPUBLICAN FORM OF GOVERNMENT AND IN HARMONY WITH THE DECLARATION OF INDEPENDENCE.

This decision was by President Roosevelt. The Attorney-General, Charles J. Bonaparte, took the case under advisement and received arguments, and reported to the President that, in his opinion, the Initiative is a Republican form of government. Following is an excerpt from the President's proclamation:

> "Whereas, it appears the said Constitution and government of the proposed State of Oklahoma are Republican in form," etc.

The President did not state his reasons for declaring the Initiative system to be a Republican form of government, nor did the Attorney-General present a written opinion, but in a letter dated December 17, 1907, to Delegate A. L. Deuel, in the Michigan Constitutional Convention, the Attorney-General says:

> "I am in receipt of your letter of the 14th inst., in reference to the Initiative and Referendum clause in the constitution of Oklahoma. The question of whether the Oklahoma constitution was in accordance with the provisions of the enabling act was very carefully considered by the department of justice, but all communications on the subject were made verbally by the Attorney-General to the President. Under these circumstances, it is of course inappropriate for me to attempt to advise you as to the view taken of any specific provision. I can only refer you to the fact, now a matter of common knowledge, that in accordance with the provisions of the enabling act the admission of the State into the Union was proclaimed."
>
> Direct Legislation Record, April, 1908, p. 40.

3. THE TWO HOUSES OF CONGRESS, EACH OF WHICH POSSESSES THE EXCLUSIVE RIGHT TO "BE THE JUDGE OF ELECTIONS, RETURNS AND QUALIFICATIONS OF ITS OWN MEM-

BERS" (Art. I, sec. 5), HAS FOR TWELVE YEARS BEEN SEATING MEMBERS FROM STATES IN WHICH THE CONSTITUTION INCLUDES THE INITIATIVE SYSTEM.

What this means is definitely set forth by the United States Supreme Court in Luther vs. Borden *et al.*, 7 Howard (U. S.), 1, 421, decided in 1849:

> "When the Senators and Representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, *is recognized by the proper constitutional authority.* And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal."

This decision by the United States Supreme Court has been followed in Texas vs. White, in 1868 (7 Wallace, U. S., 700, 731); also in Taylor and Marshall vs. Beckham, in 1900 (178 U. S. 548).

4. POINTS NOT MENTIONED BY PLAINTIFF IN ERROR CONCERNING MEANING OF "REPUBLICAN FORM OF GOVERNMENT":

(a) In 1789 leading Federalists who were advocating the adoption of proposed constitution containing limitations upon the people's power admitted, expressly, that "Republican form of Government" means people's rule, as distinguished from Aristocratic and Monarchical forms of government.

In Letter 43, in the series published in the New York papers by Hamilton, Jay and Madison, it is said :

> *"To the People of the State of New York:*
>
> "The fourth class comprises the following miscellaneous powers * * *
>
> "6. 'To guarantee to every State in the Union a republican form of government; to protect each of them

against invasion; and on application of the Legislature, or of the executive (when the Legislature cannot be convened), against domestic violence.

"In a confederacy founded on republican principles, and composed of republican members, *the superintending government ought clearly to possess authority to defend the system against arisocratic or monarchical innovations.* * * *

"But the authority [of the United States] extends no further than to a *guaranty* of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as *the existing republican forms are continued by the States,* they are guaranteed by the Federal Constitution. Whenever the States may choose *to substitute other republican forms,* they have a right to do so, and to claim the Federal guaranty for the latter. *The only restriction imposed upon them is that they shall not exchange republican for anti-republican constitutions:* a restriction which, it is presumed, will hardly be considered as a grievance." (Italics mostly ours.)

(*b*) *Federalists' construction followed in Story's Commentaries and Cooley's Constitutional Limitations.*

In "Commentaries on Constitution of the United States" by Mr. Justice Story, in the chapter elucidating Article IV, Section 4, he says:

> "The Federalist has spoken with so much force and propriety upon this subject, that *it supersedes all further reasoning.* 'In a confederacy,' says that book, 'founded on republican principles and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations.'"
>
> Constitution of the United States, by Story, sec. 1815.

In Cooley's Constitutional Limitations it is said:

> "The last provisions that we shall here notice are that the United States shall guarantee to every State a republican form of government, *and that no State shall grant any title of nobility.* The purpose of these is to protect a Union founded on republican principles and composed entirely of republican members, *against aristocratic and monarchical innovations.*"

Cooley's Constitutional Limitations, 7th ed., p. 28, citing the Federalist, Nos. 43 and 44 (probably No. 21 is meant rather than 44), and it is said: "It does not fall within our province to discuss these provisions. They have been much discussed in Congress within a few years, but in a party, rather than a judicial spirit." See—
Story on Const. (4th ed.), c. 41;
Luther vs. Borden, 7 How. 1;
Texas vs. White, 7 Wall, 700;
Cooley, Constitutional Principles, ch. XI.

Evasion by Plaintiff in Error.

This clear-cut authoritative exposition of the clause in question is not even discussed by counsel for Plaintiff in Error, but *obiter dicta* is quoted from some State cases which claim that the rule of the people results in the overthrow of civil liberty. (Pages 104-115 of Brief.)

In these State cases no mention is made of the character of government that is guaranteed by Article IV, section 4, of the Federal Constitution. The judges in these cases merely voiced the old-time arguments of the Federalists against the people's rule.

In discussing the principle involved in the case before this Court the plaintiff in error's brief is fallacious. He fails to mention that this Court has squarely decided that it has no jurisdiction to pass upon the question of whether or not a State has a republican form of government; and the brief fails to mention the Federalists' admission in 1787 that a republican form of government is equivalent to the people's-rule form, a construction that has been accepted by Story, Cooley, by Congress, and by the Executive Department; and plaintiff in error then claims that a republic is not a democracy and conceals at crucial places in his argument the self-evident fact, which he admits in other places, that representative government is not a pure democracy (pp. 80-85). This is unquestionably so. Plaintiff's play with phrases making mere surface showing. If he is held to the points in his brief he will not be able to consider the fundamental issue—the jurisdiction of this Court.

Truth is a unit, and the meaning of "republican form of government" as set forth in the Federal Constitution is shown in many ways. Following are three additional way.:

(c) *Corroborative Proof:*

(1) People the Ruling Power under State Constitutions of 1787.

The claim of Plaintiff in Error is that the representatives in the Legislautres and in Congress are Rulers and not Delegates. Plaintiff's own words are that "the multitude" should not be permitted to control legislation, and this Court is asked to prevent it.

The error in this claim is demonstrated by referring to the State governments in existence in 1787. Following are quotations from State Constitutions:

The North Carolina Bill of Rights of 1776 declares:

"1. That all political power is *vested in* and derived from the people only."

The Virginia Bill of Rights of 1776 declares:

"Section 1. That all men are by nature *equally free and independent,* and have certain inherent rights, of which, when they enter into a state of society, *they cannot, by any compact, derive or divest their posterity;* namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

"Section 2. That all power is vested in, and consequently derived from, *the people.*"

The Maryland Bill of Rights of 1776, says:

"1. That all government of right originates from *the people,* is founded in compact only, and instituted solely for the good of the whole."

The Pennsylvania Bill of Rights of 1776 declares:

"III. That the *people* of this state have the sole, exclusive and inherent right of governing and regulating the internal police of the same."

The New York Bill of Rights of 1777 declares:

"1. This convention, therefore, in the name and by the authority of *the people of this State,* doth ordain determine and declare that no authority shall, on any pretense whatever, be exercised over the people or members of this State *but such as shall be derived from and granted by them.*"

The Connecticut Constitution of 1777 declares:

"That the ancient Form of Civil Government, contained in the Charter from Charles the Second, King of England, and adopted by the People of this State, shall be and remain the Civil Constitution of this State, *under the sole authority of the People thereof, independent of any King or Prince whatever.* And that this Republic is, and shall forever be and remain, a free, sovereign and independent State, by the Name of the State of Connecticut."

In Rhode Island by act of May 4, 1776, the General Assembly transformed the colony to a commonwealth (History of the American People by Prof. Francis N. Thorpe, p. 177). *The sovereignty passed to the people.*

The first constitution submitted in Massachusetts was rejected by the people by direct vote at town meetings in the spring of 1779, because it contained no Bill of Rights and for other reasons. The next constitution submitted, that of 1780, the people adopted by direct vote at town meetings and by more than two-thirds of all who voted. The Bill of Rights declares:

> "Article I. All men are born free and equal, and have certain natural, essential, and inalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness.
>
> "Art. IV. *The people* of this commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent State, and do, and forever shall, exercise and enjoy every power, jurisdiction, and right which is not, or may not hereafter be, by them expressly delegated to the United States of America in Congress assembled."

In New Hampshire four constitutions were submitted to the people who voted directly upon them at town meetings. The first three were rejected (American Political Science Review, Vol. II, p. 549), largely because there were no express limitations upon the power of the Legislature—no Bill of Rights. The Bill of Rights of the fourth one, that of 1748, declares:

> "VII. *The people* of this state, have the sole and exclusive right of governing themselves as a free, sovereign, and independent state, and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction and right pertaining thereto, which is not, or may

not hereafter be by them expressly delegated to the United States of America in Congress assembled."

The Vermont Constitution of 1777 declares:

"IV. That *the people* of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same."

The New Jersey Constitution of 1776 declares:

"Whereas all the constitutional authority ever possessed by the kings of Great Britain over these colonies or their other dominations, was, by compact, derived from *the people*, and held of them, for the common interest of the whole society; allegiance and protection are, in the nature of things, reciprocal ties, each equally depending upon the other, and liable to be dissolved by the others being refused or withdrawn. And whereas George the Third, King of Great Britain, has refused protection to the good people of these colonies; and, by assenting to sundry acts of the British parliament, attempted to subject them to the absolute dominion of that body; and has also made war upon them, in the most cruel and unnatural manner, for no other cause, than asserting their just rights—*all civil authority under him is necessarily at an end, and a dissolution of government in each colony has consequently taken place.*

* * * * * * * * *

"IV. That all inhabitants of this Colony, of full age, who are worth fifty pounds proclamation money, clear estate in the same, and have resided within the county in which they claim a vote for twelve months immediately preceding the election, *shall be entitled to vote* for Representatives in Council and Assembly; and also for all other public officers, that shall be elected by the people of the country at large."

The Delaware Constitution of 1776 provides:

"The right of suffrage in the election of members of both houses shall remain as exercised by law at present." (Part of Article 5.)

The South Carolina Constitution of 1776 declares:

> "I. That this congress being a full and free representation *of the people* of this colony, shall henceforth be deemed and called the General Assembly of South Carolina, and as such shall continue until the twenty-first day of October next, and no longer."

The Georgia Constitution of 1777 declares:

> "We, therefore, the representatives of *the people, from whom all power originates,* and for whose benefit all government is intended, by virtue of the power delegated to us, do ordain and declare, and it is hereby ordained and declared, that the following rules and regulations be adopted for the future government of this State."

Reviewing the foregoing it is clear that in each of the thirteen State governments of the Revolutionary era the written constitutions declare that *the people are the ruling power,* as distinguished from the rule of a single individual (Monarchy), or of less than a majority (an Oligarchy or Aristocracy). This people's rule was a distinguishing feature of the American State Governments and it is the feature referred to in the Federal guarantee to maintain a "republican form of government."

Another way to show the same thing is as follows:

(2) THE MEANING OF "REPUBLICAN FORM OF GOVERNMENT" IS SHOWN BY CLASSIFYING THE SEVERAL SYSTEMS OF GOVERNMENT FROM THE STANDPOINT OF THE NUMBER WHO ARE THE RULING POWER.

A system wherein *one* individual is the ruler is termed a Monarchy, constitutional or absolute, as the case may be;

A system wherein the rule is by *less than a majority* is an Oligarchy or Aristocracy, or a Plutocracy, or Machine Rule system, or a Trustocracy, depending upon the accompanying elements; and

A system wherein the rule is by *the majority* is a Democracy or a Republic.

Another classification is from the standpoint of *the methods or ways* whereby a ruling power exercises its legislative authority:

A system wherein the ruling power legislates *direct* is termed Direct Legislation;

A system wherein the ruling power legislates *through representatives* is Representative Government or Party Government; and

A system wherein the ruling power legislates *partly direct and partly through representatives* is technically termed Mixed Government, though usually spoken of as Representative Government. Another description is "Party Government in combination with Direct Legislation (or the Initiative and Referendum)."

Words have been put together that point out both the number who compose the ruling power and the method whereby they legislate; for example, Pure Democracy and Representative Democracy, the latter term including the system in use at the present day in the States of the American Union. It includes Direct Legislation for the most important of the State laws, namely constitutional law; and for township laws, local option in cities and counties, ratification of proposed bond issues, etc., etc.

Plaintiff in Error quotes cases which expressly recognize some of the above-described distinctions; for example, that a pure democracy is different from representative democracy (pp. 80-85 of Brief); yet he also seeks to give the impression that democracy means "pure democracy" and that the term "republic" is confined to representative democracy (pp. 80-85). In this, however, he is following Madison in some of his letters in the Federalist (pp. 86-87 of

Brief). But Madison wrote Letter No. 43 (Lodge's Federalist, p. xxiv), in which it is expressly stated that "Republican form of government" is the opposite of Aristocracy and Monarchy (quoted at page 30, above). That conforms to the plain meaning of the term as viewed from the several standpoints.

We now present still another way whereby to demonstrate the fallacy of the contention of Plaintiff in Error, that for the people to rule in this country is unconstitutional.

(3). In State Governments of 1787 the representatives in the Legislatures were subject to instructions by the voters and were pledged by the voters, and through this system the people ruled.

In the States of North Carolina, Pennsylvania, Massachusetts, New Hampshire and Vermont the bills of rights in the State constitutions were worded substantially as follows:

> "No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good, nor for *instructing their representatives*, nor from applying to the legislature for redress of grievances."
>
> Constitution of Oregon, 1857, Article 1, section 27.

Further proofs are the newspapers and other written records of that era *in which are chronicled the instructions that were actually given to the representatives.* These records show that at the time of the adoption of the Federal Constitution most of the delegates to the State Conventions were instructed, which reveals a habit of instructing representatives. The evidence on this last named point has been carefully collected by Mr. O. G. Libby, of Wisconsin University, who says:

> "Very many delegates went instructed to conventions, and voted according to their instructions and in

many other cases there was a correspondence between the votes of the delegates and the ascertained attitude of the constituency; *only three exceptions have been discovered.* When the difficulty of recovering such instructions from scattered town records, newspapers, etc., is considered the number of them existing is quite remarkable."

Bulletin of the University of Wisconsin, Vol. 1, pp. 5 and 6.

In a later chapter in which Mr. Libby reviews the evidence from which the foregoing generalization is made, he says:

"The evidence reveals *a habit of instructing representatives, firmly fixed in the political ideas of the time.*"

The evidence which Mr. Libby presents shows that in the States outside of New England the principal method whereby the people voted on the adoption or rejection of the proposed constitution of 1787 was by voting for pledged candidates.

Meaning of Right to Instruct.

What is really meant by a Right to Instruct is stated as follows in the minutes of the Boston town meeting of 1764:

"By this choice they [the freeholders of this town] have delegated to you the power of acting in their Public Concerns, in general, *as your prudence shall direct you; always reserving to themselves the Constitutional right of expressing their Minds, and giving you such Instructions upon particular Matters, as they at any Time shall Judge proper.*"

Proceedings of the American Political Science Association, 1907, Vol. IV, p. 159.

In other words, *the legislative representatives are Delegates (Agents) and not Rulers.* They are clothed with discretionary power except when their constituents shall choose

to decide for themselves. In the Boston town meeting records this right to instruct is spoken of as a "constitutional right," which means that it had existed from time immemorial.

Proof of Use of Instructions.

In the township of Boston the right to instruct representatives in the General Court (Legislature) was exercised twelve times during the seventeenth century. In the eighteenth century such instructions were given at least thirty-six times before the right was inscribed in the State constitution.

Proceedings of the American Political Science Association, 1907, Vol. IV, p. 157.

Following is proof that members of Congress were instructed by direct vote of the people at town meetings, also that two proposals for a State constitution were directly voted upon by the people at town meetings.

The minutes of the town clerk of Weston, Mass., are republished in a volume in which it is said:

> "At a meeting of the freeholders and other inhabitants of the town of Weston, [Mass.] being legally warned, assembled at the public meeting house in said town on Monday, the 12th day of January, 1778, at one o'clock P. M.
>
> 1st. To hear and consider of articles of perpetual union between ye United States of America, formed and proposed to ye legislative body of this state by ye Honorable The Congress *and to instruct your representative to act and to do as you judge mostly for the advantage of this and ye United States.*
>
> "2. To hear an address of ye House of Representatives *to the Inhabitants of this State* setting forth ye reason which induced the House to pass an act for calling in the Bills of Credit emitted by ye government and obviating the objections that have been made to it.

"They then chose Josiah Strong, Esq., moderator.

"1. Voted to accept of the consideration of perpetual union as adopted by the Congress *and that the Representatives be instructed to act accordingly.*

"2. Voted not to hear the second article in the warrant at this meeting."

Twenty days later another special town meeting was held and it was voted not to act upon the warrant.

March 2d the regular annual town meeting was held at which considerable business was transacted and an adjournment taken for one week.

May 18th the freeholders and other inhabitants met to choose a representative in the Great and General Court (Legislature) to assemble May 27th.

Ten days later the freeholders and other inhabitants met at 4 o'clock P. M.—

"1. *To hear the Form of Government as adopted by the Convention of ye Massachusetts Bay AND ACT THEREON.*

"2. To know the minds of the town if they will do anything relative to the War Committee.

"3. Also to know their minds if they will make an additional grant to support the war.

"4. To know the minds of the town if they will allow to each man drafted for three months last August for ye Northern Campaign what they pay respectively for hiring of men.

"They then chose Mr. Joseph Roberts moderator for the meeting.

"1. Voted to act upon the constitution and form of government sent for their consideration.

"2. Voted to choose a committee of nine men and nominations being called for the following gentlemen were named: * * *

"3. Voted that the above committee take under consideration the plan of government *and make a report to the Town at the time of their adjournment.*

[Three other objects were considered and voted upon.]

"Voted to adjourn to June 8th at 3 o'clock."

Agreeable to the adjournment the inhabitants met and voted as follows:

"For the approbation of ye Constitution of Government..... 6
"Against it or disapprobation.....57"

This rejection of the proposed constitution of Massachusetts by the people of Weston was a fair sample of what was done in the other towns. *The people of Massachusetts vetoed the proposed system of State government and by 5 to 1 vote, for there were no limitations upon the Legislature—no Bill of Rights.* All Anglo Saxons had possessed Bills of Rights from about the year 100 A. D., and here in Massachusetts only a hundred years ago the people preserved their ancient liberties through the direct-vote system.

In 1780, two years after the Massachusetts' people vetoed the proposed constitution, they secured the submission of a splendid one and adopted it. The manner of its adoption in the township of Weston is described as follows in the minutes of the town clerk:

> "At a meeting of the freeholders and other inhabitants of the Town of Weston that were by law qualified to vote in Town affairs in public town meeting assembled on Monday the 6th day of March A. D. 1780—
>
> * * *
>
> "8. To hear the account of the Delegate chosen by the Town to attend on the convention to form a new Constitution of Government *and act thereon—*"

The hearing of the report was deferred, but on May 15th a meeting was held—

> "1. To hear and act upon a Constitution or Form of Government *agreed upon by the delegates of the people of the State of Massachusetts Bay.*"

The town clerk's minutes further show—

> "1. Voted not to choose a committee to act upon the constitution.

"2. *Voted to accept the Constitution and Form of Government as it now staands, but it is our opinion that it should be revised within ten years and made certain. Yeas* 54, *nays* 20."

In the North Carolina Colonial Records there are re-published the following instructions:

"At a general Conference of the inhabitants of Mecklenberg, assembled at the Court house on the first of November, 1776, for the express purpose of drawing up instructions for the present representatives in Congress the following were agreed to by the assent of the people present and ordered to be signed by John M. Alexander, Chairman chosen to preside for the day in said Conference.

"To Waightsill Avery, Hezekiah Alexander, John Phifer, Robert Erwin, and Zacheus Wilson, Esquires:

"Gentlemen: You are chosen by the inhabitants of this country to serve them in Congress or General Assembly for one year *and they have agreed to the following instructions which you are to observe with the strictest regard, viz: You are instructed:*

"1. That you shall consent to and approve the Declaration of the Continental Congress declaring the thirteen United States Colonies free and independent States."

Eighteen additional paragraphs of instructions by the people follow, including one for a Bill of Rights in the proposed constitution of the State; and that the instrument be referred to the people for adoption. (Vol. 10, Colonial Records of North Carolina, 870 *a*.)

In Orange County, North Carolina, the instructions to the delegates were as follows:

"We, the people of the County of Orange, who have chosen you to represent us in the next Congress of Representatives delegated by the people of this State *require you take notice that the following are our instructions to you which you are required to follow in every particular with strictest regard.*"

Vol. 10, Colonial Records of North Carolina, 870 f.

These instructions were in 1776.

Proof that in 1787 in North Carolina and in the other twelve States the delegates who were elected to the State Conventions to consider and act upon the proposal to adopt the Federal Constitution *were instructed* is the evidence that has been collected by Mr. O. G. Libby of Wisconsin University, referred to in a preceding page.

Reviewing this section it is clear that at the time of the adoption of the Federal Constitution in 1787 the representatives were Delegates and not Rulers.

Fallacious Arguments by Holders of Special Privilege.

Today, nearly a century after the people of this country had ceased to instruct at town meetings and county conferences because a better system had existed for a time, namely, party conventions, *the few who have secured special privileges and therefore are intent on preventing the restoration of the people's rule are declaring that representative government in this country is a system wherein the few men in office are not delegates but are rulers.* Among other things they attempt to prove it by quoting from Edmund Burke's speech to his constituents, in 1780, *but they conceal the further fact that his constituents refused to re-elect him, thereby maintaining their right to instruct.* Burke's speech, in which he withdrew from the contest on election day, even before the ballots were all cast, is published in the same volume from which our opponents quote, but they carefully refrain from mentioning it. In Bell and Sons' edition of Burke's speeches in Vol. II, p. 170, in declining the poll Burke said:

> "I have not canvassed the whole of this city in form. But I have taken such a view of it as satisfies my own mind, that *your choice will not ultimately fall on me.* * * * *I confided, perhaps, too much in my intentions.* They were really fair and upright; and I am bold to say, that I ask no ill thing for you, when on parting from this place I pray that whomever you choose to

succeed me, he may resemble me exactly in all things, except in my abilities to serve, and my fortune to please you."

Basis of Right to Instruct.

The people's unquestioned right to pledge representatives to obey instructions is a consequence of their right to elect to office. In the words of John Stuart Mill in Representative Government, Chapter XII:

> "Let the system of representation be what it may, *it will be converted into one of mere delegation if the electors so choose.* As long as they are free not to vote, and free to vote as they like, they cannot be prevented from making their vote depend on any condition they think fit to annex to it. By refusing to elect any one who will not pledge himself to all their opinions, and even, if they please, to consult with them before voting on any important subject not foreseen, they can reduce their representative to their mere mouthpiece or compel him in honor, when no longer willing to act in that capacity, to resign his seat."
>
> Quoted in The Platform, Its Rise and Progress, by Henry Jephson, Vol. II, page 434.

A review of this section will clearly demonstrate that at the time of the adoption of the Federal Constitution the government in the several States was such that the legislative representatives were Delegates and not Rulers.

In other words, the people in the several States possess a legal right to rule through Representative Government (Party Government) and they doubtless will so rule when the system is properly constructed.

And right here we wish to point to a most important fact.

PEOPLE'S DIRECT-VOTE SYSTEM IS CONSERVATIVELY PROGRESSIVE.

Party government in combination with a direct power in the voters through the Initiative and the Referendum is a more conservative system than is mere party government where it represents the people's interests. *History demonstrates that the people are conservatively progressive as compared with their real representatives in office,* the reason being that the real representatives devote practically all of their time to the study of human progress and they see the need for changing the laws before the people have become educated to it. Under the Initiative and the Referendum system the representatives are obliged to secure the people's consent before the constitution can be altered or new laws placed upon the statute books. *The presence of this veto power in the people necessitates the education of the people, who are self-governing under progressive leadership; whereas under the rule of the few who are in office the tendency at the present stage of human development is the retention of special privileges—the robbery of the many by the few. But under a system of self-government the citizens protect themselves; self-interest causes them to prevent a continuance of privileges conferred by law.*

For sixty years the voters in this country were a self-governing people, and they gradually abolished special privileges, resulting in a glorious civilization, described in DeTocqueville's "Democracy in America," quoted at pages 16-17 above.

REVIEW AND CONCLUSION.

A few years after DeTocquiville visited this country the people of the United States gradually lost to a considerable extent the system of self-government, as pointed out by Cal-

houn and Benton (pages 8, 11, 12 above), and for many years the people were so engrossed with the slavery question, with civil war, with reconstruction, and with industrial development, that the machine-rule system, under the guise of the people's rule, was tolerated. But the lifting of the veil in Bryce's "American Commonwealth," followed by publicity of machine-rule methods, has aroused a large proportion of the American people. They are thoroughly aroused, more so than when the British passed the Stamp Act against the Colonists and began to encroach upon their liberties. In both the great political parties there is a movement that has caused the National House of Representatives to reconstruct its procedure; and has caused Congress to rigidly provide for publicity for campaign contributions, and to expressly consent to the retention of the Initiative system in the Arizona Constitution.

We respectfully suggest that the rule laid down in Marbury vs. Madison, that the Judicial Department will not trench upon the other co-ordinate departments, should be adopted as the rule in this case; and especially do we urge the rule laid down in Luther vs. Borden and by the present Congress, that the determination of whether or not a State has a Republican form of government is for Congress—the political department. If this view is correct, then this case from Oregon should be dismissed for lack of jurisdiction.

Respectfully submitted,

George H. Shibley,
Robert L. Owen,
J. Harry Carnes,
Counsel for the State of Washington, which prays to be heard as amicus curiæ;
Of Counsel for the State of Oregon.

No. 36.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 19[redacted]

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY (A CORPORATION),
Plaintiff in Error,

v.

STATE OF OREGON,
Defendant in Error.

BRIEF SUBMITTED BY PERMISSION OF THE COURT BY

JOHN T. DYE,
ADDISON C. HARRIS.

WM. B. BURFORD, PRINTER, INDIANAPOLIS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY (A CORPORATION),
Plaintiff in Error,
v.
STATE OF OREGON,
Defendant in Error.
No. 822.

First thanking the Court for the gracious permission extended to us to submit a short brief herein, we premise by saying that we have no purpose to go over the ground at length so fully covered by the learned briefs heretofore filed, but merely to invite the attention of the Court to the constitutions of the original States and ascertain where the legislative power was vested at the time the people adopted the federal constitution. And also to point out briefly the action of the Congress, both before and after that time. These, it is thought, help to furnish the definition had in the minds of the people concurrently with their declaration that "the United States shall guarantee to every State in this Union a republican form of government."

And we venture to add a few words by way of argument in support of the contention of Plaintiff in Error that the amendment of the Oregon constitution under consideration is in conflict with the Constitution of the United States, p. 19; and further, that the question presented upon the record is a judicial question, pp. 23-27.

THE FEDERAL CONSTITUTION.

I. REQUIRES THAT EVERY STATE SHALL HAVE A LEGISLATURE.

The Constitution of the United States requires that every State shall have a legislature:

1st. To choose United States senators. (Art. 1, §§3 & 4.)

2d. To appoint in such manner as the legislature may direct presidential electors. (Art. 2, §1.)

3d. To consent to the junction of two or more States or parts of States. (Art. 4, §3.)

4th. To make application to the United States to suppress domestic violence. (Art. 4, §4.)

5th. That the legislatures of the States may cause a convention to sit for proposing amendments to the United States Constitution; and to ratify such amendments. (Art. 5.)

And Lastly. The members of the several State legislatures must take an oath to support the Constitution of the United States.

It is self-evident that a State cannot exist within the Union without a legislature. A legislature under the Constitution is necessary in order to be a Republican state; and so when the Constitution declares: "The United States shall guarantee to every State in this Union a Republican form of government," it declares the States must have legislatures. It follows that the States are prohibited from abolishing legislatures. They must maintain them intact.

What was the intent of the people when they adopted the Constitution by the clause "The United

States shall guarantee to every State in this Union a Republican form of government?" When we ascertain the part the legislatures of the several States then performed in the maintenance of the governments of the States, it will be disclosed that the supreme legislative power of the States was vested in the legislatures. It seems worth while to examine the constitutions of the eleven States which adopted constitutions between the Declaration of Independence and the adoption of the federal constitution by the people, and the charters of Rhode Island and Connecticut which remained their constitutions under the Federal constitution.

II. THE LEGISLATIVE POWER WAS VESTED ALONE IN THE LEGISLATURES OF THE ORIGINAL STATES

New York.—The Constitution of New York, adopted in April, 1777, was written by John Jay. In the preamble is set forth the resolution of the Congress "that it be recommended to the respective assemblies and conventions of the united colonies where no government sufficient to the exigencies of their affairs has been hitherto established, to adopt such government as shall in the opinion of the representatives of the people best conduce to the happiness and safety of their constituents in particular, and America in general." (Vol. 5, American Charters, Constitutions, etc., by Thorpe, page 2623, *et seq.*)

Article 2 of that Constitution reads as follows: "This convention doth further in the name and by the authority of the good people of this State ordain, determine, and declare that the supreme leg-

islative power within this State shall be vested in two separate and distinct bodies of men; the one to be called the Assembly of the State of New York, the other to be called the Senate of the State of New York; who togther shall form the legislature and meet once at least in every year for the despatch of business." (Ib. p. 2628.)

Article 31 enacts that the style of all laws shall be as follows, to wit:

"*Be it enacted by the people of the State of New York represented in Senate and Assembly:*" * * *. (Italics not ours.)

Virginia (1776.)—Section 7 of the Bill of Rights declares: "That all power of suspending laws or the execution of laws by any authority without consent of the representatives of the people is injurious to their rights and ought not to be exercised." (7 Thorpe, p. 3813.)

Section 15 of the Bill of Rights declares: "That no free government or the blessings of liberty can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by a frequent recurrence to fundamental principles."

And in the body of the Constitution (Id., p. 3815) it is declared "and in compliance with a recommendation of the General Congress (we) do ordain and declare the future form of government to be as followeth: The legislative, executive and judiciary departments shall be separate and distinct * * *. The legislative shall be formed of two distinct branches who together shall be a complete leg-

islature. They shall meet once or oftener every year and shall be called the General Assembly of Virginia. One of these shall be called the House of Delegates * * * the other shall be called the Senate * * *."

Pennsylvania (1776), (5 Thorpe, 3081).—Section 14 of the Bill of Rights reads: "That a frequent recurrence to fundamental principles and a firm adherence to justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the blessings of liberty and keep a government free. The people ought therefore to pay particular attention to these points in the choice of officers and representatives, and have a right to exact a due and constant regard to them from their legislatures and magistrates in the making and executing such laws as are necessary for the good government of the State."

Section 16 of the Bill of Rights declares: "That the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance."

Section 2 of the Constitution declares: "The supreme legislative power shall be vested in a house of representatives of the freemen of the commonwealth or State of Pennsylvania." (Ib., p. 3084.)

In November, 1789, a second convention framed a second constitution which took effect in 1790. Section 1 of Article 1 reads: "The legislative power of this commonwealth shall be vested in a General

Assembly which shall consist of a Senate and a House of Representatives." (Ib., p. 3092.)

New Jersey (1776), (5 Thorpe, p. 2594).—The preamble refers to the resolution of the Congress and recites "that the representatives of the colony of New Jersey having been elected by all the counties in the freest manner, and in congress assembled, have after mature deliberation agreed upon a set of charter rights and a form of a constitution in manner following, viz.:

"Article 1.—That the government of this province shall be vested in a governor, legislative council and general assembly."

Article 5 enacts "that the assembly when met shall have power to choose a speaker and other their officers; * * * prepare bills to be passed into laws * * *."

Article 6 provides "that the council shall also have power to prepare bills to pass into laws, and have other like powers as the assembly, and in all respects be a free and independent branch of the legislature of this colony."

Article 15 declares "That the laws of the colony shall begin in the following style, viz: 'Be it enacted by the Council and General Assembly of this Colony, and it is hereby enacted by authority of the same."

Maryland (1776), (3 Thorpe, p. 1686).—Article 10 of the Bill of Rights: "That for redress of grievances and for amending, strengthening and preserving the laws, the legislature ought to be frequently convened."

Article 11, Bill of Rights: "That every man hath a right to petition the legislature for the redress of grievances in a peaceable and orderly manner."

Article 1 of the Constitution declares: "That the legislature consist of two distinct branches, a Senate and a House of Delegates which shall be styled the General Assembly of Maryland."

The 10th and 11th articles authorize the House of Delegates and the Senate to originate bills and pass laws, etc. And Section 57 declares: "That the style of all laws run thus: 'Be it enacted by the General Assembly of Maryland;' * * *."

North Carolina (1776), (5 Thorpe, p. 2787).—Article 4 of the Bill of Rights declares: "That the legislative, executive and supreme judicial powers of government ought to be forever separate and distinct from each other."

Articl 18 thereof: "That the people have a right to assemble together to consult for their common good, to instruct their representatives and to apply to the legislature for redress of grievances."

The preamble then following recites the resolution of the Congress as authority for making a constitution, and continues: "Wherefore in our present state in order to prevent anarchy and confusion, it becomes necessary that government should be established in this State; therefore, we the representatives of the freemen of North Carolina, chosen and assembled in congress for the express purpose of framing a constitution under the authority of the people, most conducive to their happiness and prosperity, do declare, that a govern-

ment for this State shall be established in manner and form following, to wit:

"Article 1. That the legislative authority shall be vested in two distinct branches both dependent on the people, to wit: a Senate and a House of Commons.

"Article 2. That the Senate shall be composed of representatives annually chosen by ballot * * *."

"Article 3. That the House of Commons shall be composed of representatives annually chosen by ballot * * *."

"Article 4. That the Senate and House of Commons assembled for the purpose of legislation shall be denominated the General Assembly.

"Article 10. That the Senate and House of Commons when met, shall * * * sit upon their own adjournments from day to day; and prepare bills to be passed into laws.

"Article 44. That the Declaration of Rights is hereby declared to be part of the Constitution of this State and ought never to be violated on any pretense whatsoever."

Delaware (1776), (1 Thorpe, p. 562).—Article 2 declares: "The legislature shall be formed of two distinct branches. They shall meet once or oftener in every year and shall be called the General Assembly of Delaware."

Article 3. "One of the branches of the legislature shall be called the House of Assembly * * *."

Article 4. "The other branch shall be called the Council * * *."

Article 5 declares the members of both houses shall be elected and so forth "and they shall have all other powers necessary for a legislature of a free and independent State."

Massachusetts (1780), (3 Thorpe, 1888).—Article 1 declares: "The department of legislation shall be formed by two branches, a Senate and House of Representatives; * * * and shall be styled the 'General Court of Massachusetts.'"

Article 2 provides: "No bill or resolve of the Senate or House of Represntatives shall become a law and have force as such until it shall have been laid before the governor for his revisal; and if he, upon such revision, approve thereof, he shall signify his approbation by signing the same. * * *."

Then follows a provision that in case of veto two-thirds of each branch voting for the same, the bill shall have the force of law.

Article 4 declares: "And further, full power and authority are hereby given and granted to the said General Court from time to time to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this Constitution * * *."

New Hampshire (1776).—This was intended to be a temporary constitution but declared that no act or resolve shall be valid and put into execution unless agreed to and passed by both branches of the legislature. (4 Thorpe, pp. 2451-2.)

(1784).(4 Thorpe, p. 2453).—Article 32 of the Bill of Rights declares "the people shall have a right in orderly and peaceable manner to assemble and consult upon the common good, give instructions to their representatives; and to request of the legislative body by way of petition or remonstrance redress of the wrongs done them, and of the grievances they suffer."

Part II declares, under the title of "General Court":

"The supreme legislative power within this State shall be vested in the Senate and House of Representatives * * *."

And "full power and authority are hereby given and granted to the said General Court from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this Constitution as they may judge for the benefit and welfare of this State, and for the governing and ordering thereof, and of the subjects of the same, for the necessary support and defence of the government thereof; * * *." (Page 2458.)

South Carolina (1778), (6 Thorpe, p. 3248).—Article 2 declares: "That the legislative authority be vested in a General Assembly to consist of two distinct bodies, a Senate and House of Representatives."

Georgia (1777), (2 Thorpe, p. 777).—The preamble recites the resolution of the Congress, and the Declaration of Independence; and

Article 2 declares: "The legislature of this State shall be composed of the representatives of the people as hereinafter pointed out * * *."

This constitution was followed by the second which was framed by a convention which met January 4, 1789. (2 Thorpe, p. 785.)

Section 1, article 1, declares: "The legislative power shall be vested in two separate and distinct branches, to wit: a Senate and House of Representatives, to be styled the General Assembly."

Section 16 declares: "The General Assembly shall have power to make all laws and ordinances which they shall deem necessary and proper for the good of the State, which shall not be repugnant to this Constitution."

Connecticut and *Rhode Island,* having free charters, continued thereunder their state governments until 1818 and 1842. (See Charter of Connecticut, 1662, 1 Thorpe 529; Charter of Rhode Island, 1663, 6 Thorpe, p. 3211.)

The Connecticut charter declared *inter alia* that the colonial legislative body have power "from time to time to make, ordain and establish all manner of wholesome and reasonable laws, statutes, ordinances, directions and instructions not contrary to the laws of this realm of England, as well for settling the forms and ceremonies of government and magistracy fit and necessary for the said plantation, and the inhabitants there, as for naming and styling all sorts of officers, both superior and in-

ferior, which they shall find needful for the government and plantation of the said colony," etc. (Ib., p. 533.)

The Rhode Island charter creates a legislative body called a "Generall Assemblye" to whom are granted power "from tyme to tyme, to make, ordeyne, constitute or repeal, such lawes, statutes, orders and ordinances, formes and ceremonies of government and magistracye as to them shall seeme meete for the good and wellfare of the sayd Company," etc. (Ib., page 3215.)

It would seem that the people of the United States, when adopting the present Constitution, commonly understood that state statutes must be enacted by representatives sitting as a legislative body. This is confirmed by section 1, article 1, of the Federal Constitution, which declares: "All legislative power herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives." There was no thought of a plebiscite to enact or repeal statutes.

John Jay, we have seen, clearly expressed the thought of the time in the words: "The supreme legislative power within this State is vested in the legislature." A power vested in another cannot be exercised by the grantor. And as the people in no one of the original States in 1787 had the power outside of the legislature to enact statutes but that power reposed in their legislative bodies, it seems to follow that Jay expressed the general thought of the time in the phrase, "Be it enacted by the people of New York *represented* in Senate and Assembly."

III. ORDINANCE OF 1787.

This view is supported by the legislation of the Commonwealth of Virginia and the Congress concerning the territory northwest of the river Ohio. This land was taken from Great Britain by General George Rogers Clark, an officer commissioned by the State of Virginia. And so by international law, this land became the property of Virginia. But inasmuch as the land was won from a common enemy in a common cause, the legislature of Virginia on December 20, 1783, authorized the delegates of that State in Congress to convey to the United States in Congress "all the right of this commonwealth to the territory northwestward of the river Ohio." In the grant Virginia stipulated the conveyance was "upon condition that the territory so ceded shall be laid out and formed into States * * * and that the States so formed shall be *distinct Republican states* and admitted members of the Federal Union." In pursuance of that act, that State transferred to the United States by deed signed by Thomas Jefferson, Samuel Hardy, Arthur Lee, and James Monroe, then delegates in Congress, all this land. (See Vol. 1, p. 472, United States Laws.) (Our italics.)

The Congress on July 13, 1787, ordained what is commonly known as "The Ordinance of 1787." In this ordinance provision is made, *first*, for the temporary government of this land. The ordinance provides for a legislative Council and a House of Representatives who "shall have authority to make laws in all cases for the good government of the dis-

trict not repugnant to the principles and articles in this ordinance established and declared." This body is mentioned as the "General Assembly or Legislature," and when a bill is passed by a majority in each house, it is then referred to the governor for his assent or dissent.

Second. Provision is then made for the permanent government of this land. The ordinance *inter alia* declares:

"And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws, and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of States and permanent government therein, and for their admission to a share in the federal councils, on an equal footing with the original States, at as early periods as may be consistent with the general interest:

"It is hereby ordained and declared, by the authority aforesaid, That the following articles shall be considered as articles of compact between the original States, and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit:

"Art. 2. The inhabitants of the said territory shall always be entitled to the benefit of the writ of habeas corpus, and of the trial by jury; of a *proportionate representation of the people in the legislature,*

and of judicial proceedings according to the course of the common law. * * * (Italics ours.)

"Art. 4. The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the articles of confederation, and to such alterations therein as shall be constitutionally made, * * *."

"Art. 5. There shall be formed in the said territory not less than three nor more than five States; * * *. And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and state government: *provided the constitution and government, so to be formed, shall be Republican, and in conformity to the principles contained in these articles;* and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand." (Italics ours.)

In brief each State to be distinctly Republican must have a legislature to enact laws for the people.

Tennessee.—It may be noted that in the cession by the State of North Carolina to the United States of the land now Tennessee, the provisions of the ordinance of 1787 are made applicable thereto. (6 Thorpe, p. 3409, foot of page 3411.)

Kentucky.—The Act of Congress of 1790 for the government of the territory of the United States south of the river Ohio makes the ordinance of 1787 a part thereof. (3 Thorpe, p. 1263.)

The act of Congress of April 19, 1816, authorizing the people of the Territory of Indiana to form a constitution and state government declared that the convention upon being organized "shall then form for the people of said territory a constitution and state government; provided that the same whenever formed shall be republican and not repugnant to those articles of the Ordinance of the 13th of July, one thousand seven hundred and eighty-seven, which are declared to be irrevocable between the original States and the people and States of the territory northwest of the river Ohio * * *." (Sec. 4 of the Act.)

The constitutional convention sitting to establish the State of Indiana on June 29, 1816, by ordinance declared "That we will and do hereby accept the propositions of the Congress of the United States as made and contained in their act of the 19th day of April, 1816 * * *. And we do moreover for ourselves and our posterity hereby declare and ordain that this ordinance and every part thereof shall forever be and remain irrevocable and inviolate without the consent of the United States in Congress assembled first had and obtained for the alteration thereof or any part thereof." (See these Acts and Ordinances collected in the Indiana Revised Statutes of 1843, from page 16 to page 37.)

It thus appears that the Congress of 1787 in de-

claring the form of government for the new States and providing for proportionate representation of the people in the legislatures thereof had in mind the same form of governemnt for the future "distinct republican States" as then existed in the original States, which we have seen had legislatures to whom was granted all supreme legislative power in the enactment of laws. And it is such form of state government we submit that the peole had in mind when they ordained that the United States shall guarantee to every State in this Union a republican form of government.

We have thought it not improper to lay these historical facts before this Honorable Court, as they seem to show that the people then understood that in our republican form of government the supreme legislative power was exercised by representatives in General Assemblies. And we trust that it is not improper to mention that a case is now pending in the Supreme Court of Indiana in which is involved the question whether initiative and referendum legislation can be authorized in this State in the face of the Ordinance of 1787 and the Constitution of the United States. It must be conceded by everyone that a legislature has no essential part in the enactment of laws under the initiative and referendum. The bill might as well be delivered to the Secretary of State and by him sent to the people at the next election without any action of the General Assembly. Under this mode the General Assembly could be abolished except as it is required to exist to do the things stated on page 3, *supra*. It cannot

be that the people when adopting the Constitution thought that there could be a State without a legislature; or having a legislature it could be stripped of all state legislative power.

IV. THE FORM OF GOVERNMENT BY THE INITIATIVE AND THE REFERENDUM, AS SET FORTH IN THE OREGON CONSTITUTIONAL AMENDMENT, OF WHICH A COPY IS PRINTED IN THE BRIEF OF MR. PILLSBURY, IS IN CONFLICT WITH THE REPUBLICAN FORM OF GOVERNMENT GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES.

The initiative means direct legislation by the people.

The referendum means control at the polls of the action of the legislature in making laws.

"This form of government," to adopt the language used by one of its earnest advocates, "is absolute popular government." It is government by the numerical majority directly, and not through representatives. It is not a government of all for all, and by the wisest and best selected by all. It gives, absolutely, the control of legislation to mere numbers, and defeats the method which civilization has developed, by which it utilizes experience, character and wisdom in the selection of its lawmakers. It prevents the opportunity for deliberation and discussion necessary to the formation of the public will, and to its expression as the law of organized society. It takes away the security against wrong and oppression which is secured by true representation, where the representative is a trustee for the benefit of the whole people. It weakens, and in some instances destroys the guards and checks and

balances by which the historic rights, which we call natural, are protected, under a republican form of government.

Under this "absolute popular government" there is nothing to stay or check the destructive power of the waves of ignorance, or prejudice, or passion, which sometimes sweep over the surface of society. The bulwarks provided by constitutional government, are swept away. The power of the majority is absolute.

The most important contribution made by any people to the science of government is representative democracy, with its institutions, guaranties, checks and balances, and division of power, worked out by the English-speaking people, and adopted by the States before the formation of the Federal Constitution, and organized in the Federal Constitution itself, and guaranteed to the States. No greater change could be made in our institutions than by its abandonment.

James Wilson, one of the most active and influential members of the Constitutional convention, said:

> "The *Constitution of the United States*, and that of Pennsylvania, *rest solely and in all their parts, on the great democratic principle of the representation of the people.* In other words, on the moral principle known by the name of State. This great principle necessarily draws along with it the consideration of another principle equally great—the principle of free and equal elections. To maintain in purity and vigor this important principle, whose energies should pervade the

most distant parts of the government, is the duty and ought to be the first care of every free State. Let me, by the way, be indulged in repeating the remark which was made and fully illustrated in a former lecture, that *government founded solely on representation made its first appearance on this and not on the European side of the Atlantic.*" [Italics ours.]

Wilson's Works, Vol. 2, p. 9.

In the Federalist (No. 63, p. 5), James Madison said:

> "*The difference most relied upon, between the American and other republics, consists in the principle of representation, which is the pivot upon which the former moves,* and which is supposed to be unknown to the latter, or, at least, to the ancient part of it."

And on page 6 it is said:

> "The *true distinction* between these (the ancient so-called republics) and the American government, *lies in the total exclusion of the people in their collective capacity, from any share, in the latter,* and not in the total exclusion of the representatives of the people from administration, in the former."

The republics of the United States and the government of the United States, itself, have all been organized upon the basis of representative government. Representation is one of the elements of a republican form of government, by which it is distinguished from absolute popular government. The absolute popular government of Oregon differs from

the composite, specialized republican form of government, with its checks and balances and guaranties and limitations of power, adopted in the Constitution of the United States, and guaranteed to every State as much as any government could. The two forms of government are utterly inconsistent.

A government by initiative and referendum is more akin to the ancient, so-called republics of Greece, than it is to republican government as established by the Constitution of the United States and guaranteed to the States.

It is urged that the people are sovereign. This is conceded by all. But English speaking people have learned, through a long and painful struggle, that it is necessary to provide guards and guaranties as a protection against the abuse of power by the government and by themselves.

> "The majority has no natural and jural right to control the minority, for when two antagonistic interests exist in a State, to give the control to that which has a majority of votes, would give the right to destroy the other for its own benefit."
>
> Tucker, on the Constitution, page 71.

Under a representative form of government the abuse of power by the majority is guarded against by checks and balances and guaranties, by the opportunity for deliberation and discussion which it insures, by the principle which imposes upon the representative a trust for the benefit of the whole Under an absolute popular government, legislation becomes a mere contest between opposing interests,

uncontrolled by any checks or guaranties, without any opportunity for delay or discussion, or deliberation, and with the salutary influence of the principle that the representative is a trustee for all.

But it is urged that "the power to determine whether a State has a republican form of government is vested in Congress, and hence is a political, rather than a judicial question."

It was said, in *Marbury* v. *Madison* (1 Cranch 177):

> "The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls, any legislative act repugnant to it; or that the legislature may alter the Constitution by an ordinary act. * * * If an act of the legislature repugnant to the Constitution is void, does it, notwithstanding its validity, bind the courts and oblige them to give it effect? * * * This would be to overthrow, in fact, what was established in theory; and would seem, at first view, an absurdity too gross to be insisted upon. * * * If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle that the Constitution is to be considered in Court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitu-

> tion, and see only the law. This doctrine would subvert the very foundation of all written constitutions; it would declare that an act which, according to the principles and theory of our government, is entirely void, yet, in practice, is completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence; with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that those limits may be passed at pleasure."

This reasoning applies with as much force to the provision of a state constitution, as it does to an act of Congress, or of a legislature.

The Constitution of the United States is supreme, not only over Congress and State legislatures, but also over State constitutions, and if any provision in a State constitution conflicts with the supreme organic law, when a case involving civil rights is presented to the court, it must follow the supreme organic law, and not the provisions of a State constitution in conflict with it.

The case of *Luther* v. *Borden*, cited by counsel for Defendants in Error, involved the question as to which of two opposing governments was the legitimate one, viz, the charter government, or the government established by a voluntary convention, and did not involve the question in this case, whether a provision of the State Constitution was in conflict with the Constitution of the United States.

Taylor v. *Beckham*, 178 U. S. 609, involved no question as to the conflict between a provision of a State Constitution and the Constitution of the United States; and in that case Chief Justice Fuller, in delivering the opinion, said:

> "As remarked by Chief Justice Taney, in *Luther* v. *Borden*, 'the high power has been conferred upon this Court, of passing judgment upon the acts of State sovereignties, and of legislative and executive franchises of the Federal Government, and of determining whether they are beyond the limits of powers marked out for them respectively by the Constitution of the United States.' " (Page 902.)

The fact that Congress has power to determine for itself the political question whether the Constitution of a State is republican in form, before admitting it into the Union, does not exclude the power of this Court to determine when the question arises in a judicial controversy whether an amendment to a constitution made after a State has been admitted into the Union is in conflict with the Constitution of the United States. Neither does it conclude this Court, when the question arises in a proper case, from determining whether the Constitution of a State is in conflict with the Constitution of the United States.

Article 4, Section 4, of the Constitution provides that "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be con-

vened), against domestic violence." When a State has been admitted, it becomes a part of an "indissoluble union of indestructible States." The power of Congress over it under this section, is limited to protecting it against invasion or, on application of the legislature or the executive (when the legislature cannot be convened), against domestic violence.

The action of Congress does not give any validity to clauses in a State Constitution which are in conflict with the Constitution of the United States. When a judicial controversy arises in any court involving civil rights, the court must decide what law governs, whether the Constitution of the United States or the Constitution of a State.

As was said by the Court in *Gunn* v. *Barry*, 15 Wallace 610, 623; as to the State of Georgia:

> "Though her Constitution was sanctioned by Congress, this provision can in no sense be considered an act of that body. The sanction was only permissive as a part of the process of her rehabilitation, and involved nothing affirmative or negative beyond that event. If it were express and unequivocal, the result would be the same. Congress cannot, by authorization or ratification, give the slightest effect to a state law or constitution in conflict with the Constitution of the United States. That instrument is above and beyond the power of Congress and the States, and is alike obligatory upon both."

Besides Congress has never passed upon this amendment to the Oregon Constitution. There is

no way in which it can pass upon it. The political question of the admission of Oregon into the Union was decided when the State was admitted into the Union, but the admission of the State conferred no right upon the State of Oregon to amend its Constitution by inserting provisions in conflict with the Constitution of the United States.

Respectfully submitted,

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